BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KAREN R. WERNER Claimant	)	
VS.	)	
LAMBRIAR, INC. Respondent	)	Docket No. 1,034,935
AND	)	
COMMERCE & INDUSTRY INS. CO.[1] Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 7, 2009, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on May 5, 2009. R. Todd King, of Wichita, Kansas, appeared for claimant. Ryan Weltz, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant's pre-injury average weekly wage (AWW) was $412.47 until December 1, 2006, when the value of her fringe benefits were added, making her AWW as of that date $473.21.[2] The ALJ found that claimant was eligible for a work disability. She averaged the task loss opinions of Dr. Peter Bieri and Dr.

[1] Although the Award and Respondent's Application for Review by Workers Compensation Board show Hartford Insurance Company of the Midwest as the insurance carrier in this case, the Division's records, the transcript of the Regular Hearing (pg. 10), and Stipulation No. 6 of the Award sets out Commerce & Industry Insurance Company as being the insurance carrier for respondent on the date of accident in this case.

[2] Although no formal stipulation of the amount of fringe benefits is in the administrative file, the briefs to the Board and the submission letters to the ALJ of both claimant and respondent indicate an agreement that the fringe benefits were valued at $60.74 per week and that they ended December 1, 2006. However, during oral argument to the Board, the parties agreed that the value of claimant's life insurance benefit should be added to that figure.

Donald Gammel and calculated that claimant had a 20.3 percent task loss.[3] She also concluded that claimant's wage loss was 63.1 percent.[4] Thereby, the ALJ concluded that claimant had a work disability of 41.7 percent.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent requests review of all issues that were raised by respondent before the ALJ. These were set out in respondent's submission letter as nature and extent of impairment, including whether claimant is entitled to an award of work disability, and claimant's AWW. In respondent's brief to the Board, however, respondent states the primary issue on appeal is the nature and extent of claimant's disability, specifically "to what extent claimant is entitled to an award of work disability."[5] In its submission letter, respondent argues that claimant should not be entitled to a work disability because she voluntarily ended her employment with respondent. However, during oral argument to the Board, respondent conceded that the evidence was uncontradicted that respondent would not allow claimant to return to work with restrictions. Nevertheless, respondent argues that claimant did not make a good faith job search because she placed an unreasonable geographic limitation on her job search and, therefore, a post-injury wage should be imputed to her based on the opinions of Karen Terrill and Steven Benjamin. Respondent also argues that Dr. Gammel's task loss opinion of 8.6 percent, using the task list prepared by Steve Benjamin, is more credible than Dr. Bieri's opinion that claimant lost the ability to perform 12 out of the 40 tasks set out on Karen Terrill's task list.[6]

Claimant argues that the Award of the ALJ should be affirmed.

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[3] In calculating claimant's task loss, the ALJ concluded that Dr. Gammel, using Mr. Benjamin's task list, assigned claimant a task loss of 8.6 percent. However, a review of Dr. Gammel's deposition testimony indicates that he found that claimant was unable to perform 5 of the 46 tasks on Mr. Benjamin's list, which computes to an 11 percent task loss. See Gammel Depo. at 23.

[4] The ALJ apparently used claimant's AWW without fringe benefits to arrive at this 63.1 percent wage loss figure.

[5] Resp. Brief filed Feb. 18, 2009, at 1.

[6] In his deposition, Dr. Gammel testified that claimant would be unable to perform 5 tasks out of the 46 tasks set out on Mr. Benjamin's list, which computes to an 11 percent task loss. See Gammel Depo. at 23. Further, Dr. Bieri testified that claimant was unable to perform 13 of the 40 tasks on Ms. Terrill's list, which computes to a task loss of 32.5 percent. See Bieri Depo. at 18.

The issue for the Board's review is: What is the nature and extent of claimant's work disability?

FINDINGS OF FACT

Claimant was injured while working for respondent on September 1, 2006. She had just finished washing a truck and was hosing down the cement when she slipped and fell, injuring her back. She was treated first by a chiropractor, then by Dr. Blatny, a family physician, and then by Dr. McClellan, an orthopedist. In January 2007, she was released by Dr. McClellan to return to sedentary work with a 10-pound lifting restriction. She testified she spoke with Darlene Lambert from respondent in January 2007 about returning to work, and Ms. Lambert told her that she could not return until she was able to return to full time work with no restrictions. Claimant spoke again with Ms. Lambert in March 2007, after she had been released to part-time work. Again she was told that respondent would not have her back unless she could return to full time work. Claimant was released from treatment in August 2007 with restrictions. She did not attempt to get her job back at respondent because she had been told she could not return if she had restrictions.

Claimant testified that she started looking for a post-injury job in October 2007. In late November 2007, claimant started working for C & M Supply, a small gas station in Chester. She states she works 16 hours every other weekend and currently is making $6.55 per hour. She has been told that this job has the potential of becoming a full-time position when a new store is built. However, although the new store was to be completed in the spring of 2008, as of the date of the regular hearing, it had yet to be completed, and her hours have not increased since she started working there.

Claimant testified she continued to look for work after finding the job at C & M Supply. She believes she filled out between 20 to 30 applications. She admits she limited her job search to a 15-mile radius from her home in Munden, Kansas. That search included the towns of Belleville and Hebron, Kansas, and Chester, Nebraska. She said she visited businesses personally and filled out applications, and also looked in the Belleville and Hebron newspapers for job listings. The only business in Munden is the post office. Respondent's business, a dog kennel, is the only business in Mahaska, Kansas. She said that Chester has a bank, a café and a gas station.

In December 2007 or January 2008, claimant started caring for a mentally disabled person in her neighborhood. She works 40 hours per week and is paid $100 per week. Claimant testified that she has a side income from raising and selling wolf hybrid dogs. She has been doing this for 13 years, including the time she worked for respondent, and said a lady buys her litter every year for $1,500.

Dr. Peter Bieri, an ear, nose and throat specialist who performs independent medical examinations, examined claimant on July 19, 2007, at the request of claimant's

attorney. He diagnosed her with a herniated nucleus pulposus at T6-7 and said her conservative treatment was appropriate. He did not think she was a candidate for surgery. Based on the AMA *Guides*,[7] Dr. Bieri rated claimant as having a 10 percent functional impairment to the body as a whole.

Dr. Bieri noted that claimant had been released from treatment with restrictions consistent with a light-medium physical demand level, which he considered to be appropriate. He believed she should have restrictions limiting occasional lifting to 35 pounds, frequent lifting not to exceed 20 pounds, and no more than 10 pounds of constant lifting.

Dr. Bieri reviewed the task list of Karen Terrill. Of the 40 nonduplicative tasks on the list, Dr. Bieri opined that claimant is unable to perform 13 for a task loss of 32.5 percent. He also reviewed the task list of Steven Benjamin. Of the 46 nonduplicative tasks on that list, he believed that claimant was unable to perform 9 for a task loss of 20 percent.

Dr. Donald Gammel specializes in occupational medicine. He is a board certified independent medical examiner. He conducted an independent medical examination of claimant on August 7, 2007, at the request of respondent. Claimant complained to Dr. Gammel of a deep aching and burning pain in her upper back between her shoulder blades. Dr. Gammel's understanding was that claimant slipped and fell on her right elbow and hip while working. She was treated conservatively with anti-inflammatory medications.

Dr. Gammel's physical examination of claimant revealed her range of motion was normal for the thoracic spine, she had no spasm, her neurological examination was normal, and there were no gross abnormalities. He diagnosed her with degenerative disease of the spine, thoracic region, which he said was preexisting but which was permanently aggravated by her work injury. Based on the AMA *Guides*, Dr. Gammel rated claimant as having a 5 percent permanent partial impairment to the whole person.

Claimant told Dr. Gammel that she can work in the house or yard about 45 minutes before the burning and pain in her back increase and she has to stop. The pain is relieved by heat and ice. She said she cannot do heavy lifting. She can walk at least four blocks at a time, and can sit as long as she has a small towel rolled behind her. She cannot stand more than one hour.

Dr. Gammel recommended the following restrictions: In an 8-hour day, claimant could sit continuously, but should walk and stand only for 2 hours at a time. She could sit, stand and walk for 8 hours during an 8-hour day. Claimant can lift up to 10 pounds frequently and 35 pound occasionally. She should not lift more than 35 pounds. She can

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[7] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

occasionally bend, stoop, squat, crouch, crawl, kneel and climb ladders. She can frequently reach out, climb stairs and reach above her shoulder. She can continuously drive. He opined that claimant could tolerate an 8-hour workday with varying of physical positioning as needed. Dr. Gammel reviewed a task list prepared by Steve Benjamin. Of the 46 nonduplicative tasks on that list, he opined that claimant is unable to perform 5 for a task loss of 11 percent.

Karen Terrill, a rehabilitation consultant, interviewed claimant by telephone on March 12, 2008, at the request of her attorney. Together they compiled a list of 40 nonduplicated tasks that claimant had performed in the 15-year period before her injury.

Claimant told Ms. Terrill that she had returned to work part time since the accident working for a gas station in Chester, Nebraska. Claimant said she hoped the job would become a full-time position. Ms. Terrill said that such a job would be within her restrictions and is the type of work claimant is familiar with. Taking into account claimant's education, work history, training, geographic location and restrictions, Ms. Terrill said claimant's job at the gas station is as good an option as she would find.

Steve Benjamin, a vocational rehabilitation counselor, interviewed claimant by telephone on May 23, 2008, and May 28, 2008, at the request of respondent. He prepared a list of 46 nonduplicated tasks claimant had performed in the 15-year period before her injury.

Claimant told Mr. Benjamin that she had applied for work at between 20 to 30 employers. She began in December 2007 and last applied for work in March 2008. Claimant had not registered with any local Workforce Development Center or agency that provided job placement services. When Mr. Benjamin interviewed her in May 2008, she was working for C & M Supply making $6.25 per hour. It did not surprise Mr. Benjamin that the job claimant has now was the only job open in her geographic area at the time she was applying for work. He agreed that it was reasonable for claimant to stay at her job with C & M Supply because of the potential the job would turn into full time. He also recommended that claimant continue to look for full time employment if she wants to earn more money. He believes there should be full-time entry level jobs available in claimant's geographical area, and those entry level jobs would pay between $6.25 and $8 per hour.

The larger towns in claimant's geographical area, which Mr. Benjamin considered to be a 50-mile radius of Munden, were Belleville and Concordia, Kansas, and Fairbury, Geneva, and Superior, Nebraska. None of them are big towns. Mr. Benjamin did not perform a labor market survey to find out how many jobs would be available within that geographic area.

When computing claimant's wage loss, the ALJ used a post-injury AWW of $152.40, which she computed by adding the $100 per week claimant earned caring for the mentally disabled neighbor to the amount claimant earned working at the gas station (32 hrs. per

month x $6.55 per hour ÷ 4 weeks = $52.40). The ALJ found that claimant had a 63.1 percent wage loss. This wage loss would be the correct figure when using claimant's preinjury AWW before the addition of fringe benefits. However, after December 1, 2006, claimant's percentage of wage loss would have been 68.

In computing the claimant's task loss, the ALJ averaged the two task loss opinions of Dr. Bieri and the task loss opinion of Dr. Gammel. However, Dr. Gammel opined that claimant had an 11 percent task loss, instead of the 8.6 percent used in the ALJ's computation. An average of the three task loss opinions of 32.5 percent, 20 percent and 11 percent would compute to 21 percent.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Foulk*,[8] the Kansas Court of Appeals held:

> The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system.

Later, in *Copeland*,[9] the Court of Appeals stated:

> In attempting to harmonize the language of K.S.A. 44-510e(a) with the principles of *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), the factfinder must first make a finding of whether a claimant has made a good faith effort to find appropriate employment. If such a finding is made, the difference in pre- and post-injury wages can be made based on the actual wages.

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.[10]

The Kansas Court of Appeals in *Watson*[11] held the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[12]

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[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 284, 887 P.2d 140, (1994), *rev. denied* 257 Kan. 1091 (1995).

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, Syl. ¶ 7, 944 P.2d 179 (1997).

[10] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, Syl. ¶ 3, 9 P.3d 591 (2000).

[11] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[12] *Id.* at Syl. ¶ 4.

Despite clear signals from recent decisions of the Kansas Supreme Court that the literal language of the statutes should be applied and followed whenever possible,[13] there has yet to be a specific repudiation of the good faith requirement by the Supreme Court. Absent an appellate court decision overturning *Copeland* and its progeny, the Board is compelled by the doctrine of *stare decisis* to follow those precedents. Consequently, the Board must look to whether claimant demonstrated a good faith effort post injury to perform the accommodated job with respondent and, thereafter, to find appropriate employment.

ANALYSIS

Claimant suffered a work-related accident and injury which resulted in permanent restrictions and limitations. Because of those restrictions, claimant was unable to return to her former job with respondent. This placed claimant into the open labor market in a geographic area with very few job opportunities, especially for someone incapable of performing heavy physical labor. Although she limited her job search effort to a 15-mile radius from her home, the Board does not find that to be unreasonable in this case. The jobs claimant is capable of performing pay low wages. The distance someone is expected to travel in good faith for a minimum wage job is less than what might be expected for a higher paying job. Furthermore, there is no evidence in this record that jobs are available that fit within claimant's restrictions in Concordia or elsewhere within a 50 mile distance. Moreover, claimant has never traveled beyond 15 miles from her home to work. And finally, the part-time job claimant is working with C & M Supply has the potential of becoming full time. The Board agrees with the ALJ's conclusion that claimant demonstrated a good faith job search effort and is not attempting to take advantage of the workers compensation system.

Claimant's gross preinjury AWW should include the value of the life insurance provided by the employer, which is $1.19 per week. When this is combined with the $473.21 figure arrived at by the ALJ, claimant's AWW, inclusive of additional compensation items, equals $474.40.

Claimant is making a good faith effort to find employment within her restrictions post accident. A wage should not be imputed to her. Rather, her actual post accident earnings of $152.40 per week will be utilized for the wage loss prong of the two-part work disability formula. When her actual post accident gross weekly wage of $152.40 is compared to her preinjury gross AWW, inclusive of fringe benefits, of $474.40, claimant's wage loss is 68 percent.

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[13] See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007), and *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007); *Gutierrez v. Dold Foods, Inc.*, 40 Kan. App. 2d 1135, Syl. ¶ 5, 199 P.3d 798 (No. 99,535 filed January 16, 2009).

In this case, the Board also agrees with the ALJ's approach of averaging the task loss opinions of the physicians. However, Dr. Gammel's opinion using the task list prepared by Mr. Benjamin was that claimant lost the ability to perform 11 percent of her former work tasks, not 8.6 percent as found by the ALJ. When this is averaged with the 32.5 percent task loss opinion of Dr. Bieri using Mr. Terrill's list and his 20 percent opinion using Mr. Benjamin's list, the task loss is 21 percent. And when this 21 percent task loss is averaged with claimant's 68 percent wage loss, her work disability is 44.5 percent.

CONCLUSION

Claimant has a 68 percent wage loss and a 21 percent task loss for a 44.5 percent work disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated January 7, 2009, is modified as follows:

Claimant is entitled to 12.86 weeks of temporary total disability compensation at the rate of $274.99 per week or $3,536.37, followed by 35.14 weeks of temporary total disability compensation at the rate of $316.28 per week or $11,114.08, followed by 169.99 weeks of permanent partial disability compensation at the rate of $316.28 per week or $53,764.44 for a 44.50 percent work disability, making a total award of $68,414.89.

As of May 8, 2009, there would be due and owing to claimant 12.86 weeks of temporary total disability compensation at the rate of $274.99 per week in the sum of $3,536.37, plus 35.14 weeks of temporary total disability compensation at the rate of $316.28 per week in the sum of $11,114.08, plus 92 weeks of permanent partial disability compensation at the rate of $316.28 per week in the sum of $29,097.76, for a total due and owing of $43,748.21, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $24,666.68 shall be paid at the rate of $316.28 per week for 77.99 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of May, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Ryan Weltz, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge